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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-110

EAGLE STAR INSURANCE GROUP, Garnishee,
Petitioner,

v.

CARL N. WALKER, Administrator of the Estate of Norbert N. Walker, deceased,

and

THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation,
Respondents.

EAGLE STAR INSURANCE GROUP, Garnishee,
Petitioner,

v.

MARY C. FLAVIN, Administratrix of the Estate of Wilbert F. Gries, deceased,

and

THE TILLEY LAMP COMPANY, LIMITED, a corporation; THE TILLEY LAMP CO. (U. S. A.) LTD., a corporation; and A. W. THACKER, INC., a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of Question Presented

Should the Supreme Court of the United States issue a writ of certiorari where the Court of Appeals for the Third Circuit has upon review of the record found that the District Court has not acted arbitrarily or unfairly in refusing to vacate a default judgment?

Counter-Statement of the Case

Norbert N. Walker and Wilbert F. Gries, both citizens of Pennsylvania, died October 1, 1967 in McKean County, Pennsylvania as a result of inhalation of toxic fumes from a defective kerosene heater manufactured by The Tilley Lamp Company, Ltd. At the time of this occurrence Tilley Lamp Company was covered by a liability insurance policy issued by Eagle Star Insurance Group, a company registered to do business in Pennsylvania. The kerosene heater had been purchased in Pennsylvania by Wilbert F. Gries.

Complaints against Tilley Lamp Company were filed September 18, 1968. Service of the Complaints was made upon Tilley Lamp September 24, 1968. Eagle Star was notified of the suit October 4, 1968. Eagle Star, however, failed to enter an appearance, contact counsel for decedents' estates or in any other manner participate in the litigation. Defaults were entered December 12, 1968, against Tilley Lamp Company for failure to file Answers or otherwise plead. A non-jury trial on damages was held January 6, 1969, and judgments were subsequently entered.

Subsequent to the entry of judgment against Tilley Lamp counsel for decedents' estates discovered evidence of insurance and the probable identity of the insurance carrier by securing a copy of Answers to Interrogatories filed by Tilley Lamp in an action in The United States District Court for the Middle District of Florida.

On April 21, 1971, counsel for decedents' estates filed Praecipes for Writ of Attachment Execution, naming Eagle Star as garnishee, and also filed Interrogatories in Attachment directed to the garnishee. The Interrogatories were endorsed with notices to answer within twenty (20) days from the date of service, according to the applicable Rule

of Court. Service of the Writs of Execution and Interrogatories was made upon the Insurance Commissioner of Pennsylvania, statutory agent for the garnishee, on April 22, 1971, and copies were received by certified mail by Eagle Star at its United States Office, 75 Maiden Lane, New York, New York, on April 23, 1971.

On April 26, 1971 Eagle Star wrote an inquiry to counsel for decedents' estates concerning the matter. Counsel's reply of April 29, 1971, did not merely refer Eagle Star to the Answers to Interrogatories filed in The United States District Court for the Middle District of Florida, but included a copy of both the Interrogatories and Answers thereto. This provided Eagle Star with *specific* information as to identity of the insured, the Policy Number, and the effective dates of coverage. In spite of this information, Eagle Star failed to file Answers to Interrogatories and made no further attempt to contact counsel.

Although the twenty-(20)-day time limitation for answering Interrogatories in Attachment expired May 13, 1971, default judgments were not entered until June 4, 1971, forty-three (43) days after service. On June 10, 1971, Eagle Star filed its Motions to Vacate Judgment pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure.

A hearing on the Motions to Vacate Judgment was held before the Honorable Herbert P. Sorg, District Judge of the United States District Court for the Western District of Pennsylvania. The Motions to Vacate Judgment were denied and Eagle Star appealed to the United States Court of Appeals for the Third Circuit. After review of briefs and oral argument, the Circuit Court of Appeals affirmed judgment of the District Court in a *per curiam* opinion.

ARGUMENT

Petitioner has failed to set forth grounds for the issuance of a Writ of Certiorari. The central issue in this matter is the exercise of sound discretion by the District Judge in denying petitioner's Motion to Vacate default judgments entered against petitioner. Federal Courts in all of the Circuits agree that a Motion to Vacate a judgment is addressed to the sound discretion of the District Judge and his determination will not be disturbed upon appeal except for an abuse of discretion. *Gomes v. Williams,* 420 F. 2d 1364 (10th Cir., 1970); *Madsen v. Burub,* 419 F. 2d 4 (9th Cir., 1969); *Aviation Specialties, Inc. v. Thompson,* 395 F. 2d 199 (9th Cir., 1968); *Parker v. Broadcast Music, Inc.,* 289 F. 2d 313 (2d Cir., 1961); *Hughes v. Holland,* 320 F. 2d 781 (D. C. Cir., 1963).

In the instant case the District Judge and the Circuit Judges stated their recognition of the principle that the Rules covering Motions to Vacate Default Judgments must be liberally interpreted. Even allowing for liberality of interpretation, however, the District Judge found that the acts and omissions of Eagle Star from the very beginning of the case demonstrated a conscious disregard for legal process and that such unexplained disregard for legal process does not constitute excusable neglect.

The District Judge further found that Eagle Star had not set forth a meritorious defense.

In reviewing the District Judge's opinion, the Circuit Court of Appeals stated:

> "However, on the present record we cannot say that the District Court acted arbitrarily or unfairly in refusing to Vacate the Default."

In order to create an issue of sufficient interest to warrant review by this Court Counsel for petitioner have attempted to review defenses already ruled upon by the District Court and affirmed by the Court of Appeals and have attempted to compare this case with two cases previously decided by this Court.

Home Insurance Company v. Dick, 281 U. S. 397 (1929), and *Lauritzen v. Larsen,* 345 U. S. 571 (1953), cited by petitioner, are clearly distinguishable from the instant case. Both cited cases involved conflict-of-laws questions wherein the forum state attempted to apply its own laws to a case, even though the forum state's connection with both the parties and the cause of action was extremely remote and tenuous. In the instant case no conflict-of-laws question is presented, and the forum state's connection with the parties and the cause of action is direct and meaningful. In the instant case both decedents were citizens of Pennsylvania; the cause of action arose in Pennsylvania; decedents both died in Pennsylvania; the insurance contract by its terms was intended to cover products sold in Pennsylvania; decedent, Wilbert F. Gries, purchased the Tilley Lamp in Pennsylvania; defendant, The Tilley Lamp Company, Ltd., does business in Pennsylvania; and the garnishee-petitioner, Eagle Star, is registered to do business in Pennsylvania. The District Court has properly found that to require an injured resident of Pennsylvania to present his claim to a Court in the United Kingdom in order to obtain practical redress for his injuries is unreasonably restrictive and contrary to the public policy of Pennsylvania.

It may be further noted that because of the avoidance tactics of both Eagle Star, and Tilley Lamp Company, counsel for decedents' estates never learned of the insurance policy involved and its provisions, until after the statute of limitations had run in the United Kingdom.

Petitioner's design defects exclusion defense is entirely without merit. Contrary to petitioner's argument, the District Court did not make a finding of fact that a design defect existed. In entering judgment after a default, the Court states Tilley Lamp's liability in the alternative. In the Walker case the Court states findings as follows:

> "3. On or about October 1, 1967, Norbert N. Walker died as a result of inhalation of toxic fumes from a defective kerosene lantern manufactured and sold by the defendants. The said lantern was negligently designed *and/or* negligently manufactured." (Emphasis supplied.)

In the Gries case, the Court stated:

> "3. On or about October 1, 1967, Wilbert F. Gries died as the result of inhalation of toxic fumes of a kerosene lantern manufactured and sold by defendants."

In the Walker case, the District Court made other specific findings of liability upon the part of Tilley Lamp which are not covered by the design defects exclusion.

Eagle Star's Motion to Vacate Judgment and the amendments thereto disclose no averments or offer of proof that a design defect existed in the Tilley Lamp which caused the death of Norbert N. Walker and Wilbert F. Gries.

Petitioner's satisfaction and settlement defense is also without merit. Pennsylvania Supreme Court cases subsequent to *Thompson v. Fox,* 326 Pa. 209, 92 A. 107 (1937) cited by Petition, clearly state that the release of one not shown to be jointly liable does not release a tortfeasor. The settlements between decedents' estates and D. Lux Sales, Inc. were compromise settlements in each case for less than one-half the actual damages. D. Lux Sales, Inc. was neither an admitted nor an adjudged tortfeasor. Furthermore, petitioner's own statement agrees that D. Lux was not a joint tortfeasor with Tilley Lamp.

In *Koller v. Pennsylvania Railroad Company*, 351 Pa. 60, 40 A. 2d 89 (1944), the Pennsylvania Supreme Court states at 351 Pa. 63:

> "Since there was no community of fault, there was no joint tort. In a situation such as this, the law is equally clear that a release of one *not shown* to be liable does not release a tortfeasor." (Emphasis supplied.)

In *Wilbert v. Pittsburgh Consolidation Coal Company*, 385 Pa. 149, 122 A. 2d 406, 407 (1956), the court stated:

> "As the release was executed and delivered prior to the effective date of the Uniform Contribution Among Joint Tortfeasors Act of July 19, 1951, P. L. 1130, 12 P. S. §§ 2082-2089, the common-law rule that a release of one joint tortfeasor is a release of all would have been applicable. See *Thompson v. Fox*, 326 Pa. 209, 212, 213, 192 A. 107, 112 A. L. R. 550, and cases there cited. However, in order that a release of one person from liability may bar an action against another for the same injury, the two must have been *jointly liable*. Accordingly, a release of one who is not legally liable for an injury to another does not operate to release the culpable tortfeasor." (Emphasis supplied.)

Conclusion

Petitioner has failed to set forth a valid reason for the issuance of a Writ of Certioari to review the judgment of the Court of Appeals The petition for writ of certiorari should be denied.

Respectfully submitted,

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Walker and Flavin.

Dated: August 9, 1972.